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Book Review. Degradation: What the History of Obscenity Tells Us about Hate Speech by Kevin W. Saunders

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DEGRADATION: WHAT THE HISTORY OF OBSCENITY TELLS US ABOUT HATE SPEECH

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by Kevin W. Saunders. New York: New York University Press, 2011. 256pp. Cloth \$45.00. ISBN: 9780814741443.

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pp.505-507

Professor Kevin Saunders' book addresses two topics in of First Amendment law not commonly associated with one another, obscenity law and hate speech. Obscenity is viewed as primarily concerning "sex," and hate speech is considered to be about "race." As Saunders explains, obscenity law focuses on the rights of individuals to access sexually explicit materials. Saunders includes within his ambit several types of hate speech including racist, sexist and homophobic speech, although some speech categories are not as developed as others. He immediately locates the similarities between obscenity and hate speech in his introduction to hate speech, citing critical race theorists including Richard Delgado and Mari Matsuda, who characterize hate speech as assaultive and note the physical injury that such speech causes (Matsuda, et al., 1993). The aim of Saunders' book appears not just to demonstrate the similarities between these two types of speech, but also to suggest how examining the legal treatment of obscenity in the United States can guide the sanctioning of hate speech, if at some point society wishes it.

Saunders begins the book with an extensive treatment of pornography, dating back to the Greek and Roman eras. He maintains that sexual obscenity is linked to the relationship between "humans and God or gods on the one hand and humans and animals on the other" (p.75). In tracing the acceptance of open sexuality in Greek and Roman culture, Saunders notes the absence of sexually obscene material or even a concept of obscenity in these societies. In Chapter 5, "A Look at Other Cultures," Saunders finds a similar lack of shame concerning sex in Islamic as well as Jewish culture. In this chapter, Saunders also explores the effect of religious culture on attitudes towards sex in India, China, Japan and Scandinavia. In distinguishing Western Christian civilization, Saunders gives several reasons for the increased regulation of pornography and the creation of a category of obscene materials. He notes that in the West, increased regulation of obscenity occurred during the Enlightenment and the French and Industrial Revolutions. At these various time periods, in a wide variety of places pornography came to be seen at least in part "as depicting humanity in a less than human way" (p.73). Saunders distinguishes China and Japan from the Western approach. In China and Japan, people, along with gods and animals, were engaged in natural and enjoyable activities, "and with no shame associated with those activities, the depictions of human sexuality can be open" (p.86).

Saunders provides a nuanced discussion of the Supreme Court's approach to [*506] regulation of obscenity in the United States, the social disdain for obscenity developed into law with the Supreme Court first recognizing a legitimate state interest in government regulation of obscenity in 1957 in its decision in *ROTH v. UNITED STATES*. The Court continued its willingness to limit free expression in the context of obscenity. Prohibition of obscenity applied in two contexts, when children may be affected or when unwilling viewers might encounter obscene materials.

The notion that obscenity may be regulated despite the encroachment on free speech contrasts markedly with the broad protections accorded to hate speech. As Saunders makes clear, in a variety of different cases from fighting words to cross burning, the Supreme Court has offered First-Amendment protection for hate speech. This relatively unique position of the United States diverges from the approach of many other countries including Canada, Germany, Austria, Belgium, Brazil, Cyprus, England, France, India, Israel, Italy, and Netherlands all of which penalize the dissemination of hate speech.

Saunders warms to his purpose in Chapter 7, “Using Obscenity Doctrine to Address Hate Speech.” The justification for using an obscenity-based approach to address the regulation of hate speech may well be Saunders’ most valuable contribution to the hate speech literature. As Saunders indicates, obscenity may not be thrust on an unwilling recipient. Hate speech, however, is so harmful, Saunders notes, precisely because it is thrust on to unwilling recipients. “It is the racist invective hurled at a member of an ethnic or racial minority that causes the psychic, and even physiological, damage. There is no consent to receive that speech in society's interest in shielding this victim is stronger than shielding from obscenity the willing viewer” (pp.128-129).

Saunders offers a straightforward doctrinal analysis of the ways that the MILLER test for obscenity, created by the court in 1973 in MILLER v. CALIFORNIA, may be adapted to the regulation of hate speech. As Saunders notes, given the current doctrinal landscape, it would be an uphill battle for US courts to accept bans on hate speech. He spend a fair amount of time engaging with hard cases — such as how to deal with various forms of sexist and racist speech on campus. This allows readers to get some idea of how his theory works “on the ground.” In Chapter 8, one of the main hard cases he has selected involves a well-meaning basketball coach who has used the word, “nigger” to motivate his players. Because the coach is clearly well-meaning, all of the players themselves understood his meaning and any offense taken seems slightly ridiculous, Saunders’ example does not particularly showcase his obscenity-based approach. A case involving intention to harm or demean would have been representative of hate speech generally and would have provided a more interesting test of his approach.

Though it is not spelled out explicitly in the book, Saunders’ framework clearly has broad application to a variety of empirical factors that concern hate speech — particularly who is targeted, and who uses hate speech. Saunders is to be commended for his focus in Chapter 9 on the impact of hate speech [*507] on children. This is as crucial in light of the targeting of children by extremists on the right and the vulnerability of children to hate speech. Saunders describes in detail the marketing of hate speech to children by neo-Nazis and other extremist groups. He also discusses children's First-Amendment rights and their developmental vulnerabilities, which make hate speech so harmful. Saunders’ remedy would be especially useful in preventing the harms and dangers that children may face from hate speech. Finally, a related issue that Saunders does not address is the issue of youth as perpetrators. Large numbers of hate crimes -- crimes motivated by bias on the basis of race, religion, ethnicity or protected category — are committed by juveniles (Bell, 2002). Frequently these crimes involve speech. By focusing on injury in particular cases Saunders’ theory helps break through the confusing thicket of defenses offered by users of hate speech. In the unlikely event that his theory could be legally applied, it might actually offer some relief to individuals targeted.

Saunders seems aware of some of the limits of his approach. In the conclusion he notes that he does not explicitly address issues of race relations. In failing to say very much about race relations, Saunders’ approach is distinct from both critical race theorists who discuss hate speech and most First-Amendment scholars. In leaving entirely aside the issues of race relations that lead some individuals to employ hate speech, and others to be targeted by it, Saunders may be missing more than he realizes. Even a brief discussion of the race relations and use of hate speech would provide much-needed insight regarding power, and strengthen his argument regarding the destructive nature of hate speech. The book might have also benefited from a much more full discussion of sexist and homophobic speech. Though Saunders indicates that the theory is intended to apply these types of speech as well, sexist and homophobic speech received very little theoretical treatment in the book and decidedly little application. Both of these are minor concerns however, since overall the book makes a substantial contribution to this decidedly thorny area of First Amendment law.

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